

Transcript: These docs are trying to kick private equity out of their ER

Dan: Hey there. We've talked on this show about how private equity investors have been aggressively moving into American health care. They're credited with, among other things, pioneering surprise billing as a business model.

And... a lot of doctors do not like working for private equity. Here's Dr. Lisa Moreno. She's an ER doc, a professor of emergency medicine, and immediate past president of the American Academy of Emergency Medicine.

Dr. Lisa Moreno: A doctor takes a Hippocratic oath and our duty is to do the right thing for every patient every time, That is what we swear to do. Corporations on the other hand, have a fiduciary duty to make money for their shareholders. And of course, to make big salaries for the people that run the corporations

Dan: You can see how there could be a conflict there. The doctor thinks you need to be seen for longer. The corporation wants the doc to move on to the next person.

You might think: Shouldn't there be laws against corporations having the last word in those kinds of conflicts? And in a lot of states, there are laws against the corporate practice of medicine.

But who exactly is supposed to enforce those laws? And how?

Dr. Lisa Moreno and her colleagues at the American Academy of Emergency Medicine have decided: They're gonna take a stab at it.

They're suing a private-equity backed company called Envision, and they're asking a judge to kick Envision out of the business of telling emergency-room doctors what to do. At least in California.

And the judge says they may have a case.

This is An Arm and a Leg--a show about why health care costs so freaking much, and what we can maybe do about it. I'm Dan Weissmann. I'm a reporter, and I like a challenge-- so my job on this show is to take one of the most enraging, terrifying, depressing parts of American life and bring you a show that's entertaining, empowering and useful.

And along with our producer, Emily Pisacreta, I've been following this story for months.

Emily: Honestly, I have so many tabs open right now.

Dan: Emily, you talked with Lisa Moreno earlier this spring. And one thing that came up was: Why hasn't anybody done this before?

Emily: Yeah, she said her group has been interested for a long time. She says they hear from doctors all the time. That docs get threatened with punishment-- like losing shifts-- for ordering treatment for people who are uninsured.

Dan: Or for refusing to admit people who have good insurance.

Emily: Or just for insisting to their boss: "Hey, we're understaffed and it's not safe for our patients."

And Dr. Moreno says doctors in these situations don't have a lot of rights. She says they often have to sign contracts that say their employment is at-will. They can be fired any time for no reason.

Dan: And she said the contracts often have non-compete restrictions-- meaning the doctor can't practice anywhere near the place where they got fired from.

That's is a high-pressure situation.

Dr. Lisa Moreno: We've had cases like this, a doctor and his wife was an attorney and she was a partner in her firm. And she was like, I can't move 200 miles away. They had three children that were in school that didn't want to leave their friends.

Emily: A lot of doctors don't speak up, don't want to take a risk. But people DO get fired, she says, for doing the right thing by patients.

Dr. Lisa Moreno: We saw this happen multiple times, going over like two decades and we would defend the physician,

Dan: And then the company says, how about we settle this out of court?

Dr. Lisa Moreno: they'll offer

a physician who now has been out of work for maybe two years.

As a mortgage has medical school loans has children to support. They offer them a cash settlement and the physician says, okay, I'll take it. We understand that. But the problem that comes up is when that happens, we don't get a court ruling.

Dan: And that means there's no precedent. No legal opinion that the NEXT doctor could point to. Nothing to build on.

Emily: And then last fall, she learned, Envision was taking over the job of managing emergency-room docs at a hospital in southern california, in Orange County, about nine miles northeast of Disneyland.

Dan: And when Lisa Moreno heard about it, her reaction was not exactly what you might expect.

Dr. Lisa Moreno: I was. Thrilled

Dan: And she was thrilled because of who Envision took that job over from.

It was from a practice-management service run by... the American Academy of Emergency Medicine. Her own outfit.

Dr. Lisa Moreno: , this is the first time that AAM itself has standing legal, standing in a lawsuit

Dan: That is, when you bring a lawsuit, you're basically telling the court: Hey, this person SCREWED me. Make 'em fix it.

In earlier cases, it was individual doctors who were getting screwed. That's who had standing. It was up to the individual doctor to bring a lawsuit, or to settle.

In this case, Dr. Moreno's group itself is getting screwed. It got screwed out of the contract to help run that ER near Disneyland.

Dr. Lisa Moreno: . So our attorneys were quite happy. They said, here's a case where AAM can actually bring the lawsuit.

Dan: And she was happy. Thrilled, even.

Dr. Lisa Moreno: I was thrilled that we would have an opportunity to stand up for physicians. I was also terrified. I was terrified because I realized how much money this was going to cost.

Emily: I mean, you're talking about suing a company that has, effectively, unlimited funds to defend itself. Lawyers for Dr. Moreno's group tell her it's gonna cost 2 million dollars -- more if the case goes to appeal.

Dr. Lisa Moreno: this is spending everything that we have in the bank. Everything that we have in the bank, we are putting everything that we have on the line for what we stand for, for what we believe in.

Emily: If they win, they're asking the judge to make the other side pay their attorney fees, but otherwise, they're actually not asking for money. At all. Which Dr. Moreno says is an important part of her group's strategy.

Dr. Lisa Moreno: When you seek monetary damages, you give the defendant the opportunity to settle out of court. We are not giving envisioned the opportunity to settle

out of court. While we are saying is envision has broken the law. They are illegally practicing medicine. There is no amount of money. That is going to fix that problem.

So because of the fact that they cannot settle with us out of court, because we seek no money, no monetary damage. This case is going to be heard in court and there was going to be a ruling.

Dan: That's the idea. Dr. Moreno's group filed their lawsuit in December, and at the end of May they scored an early victory: If you get sued, one early thing you can do is file what's called a "motion to dismiss," saying, there's no case here.

Emily: You can bet Envision's lawyers did exactly that. There are hundreds of pages of motions, and responses, and counter-responses.

Dan: And one of the big points that Envision's attorneys made was: Whoa there. Hey, you've got us mistaken for somebody else. WE don't own any medical practices. That would be illegal. The entity that won the contract with the hospital near Disneyland? That's owned by a doctor.

I mean, maybe we've got business dealings with that doctor, but we don't own a medical practice. We don't tell doctors what to do.

And of course. It's not like what was happening with that ER contract was particularly unusual. Erin Fuse Brown is a law professor at Georgia State University. She studies private equity's role in health care.

She says these laws against the corporate practice of medicine exist all over the place. And they haven't stopped big companies from... well, owning a lot of companies that employ a lot of doctors. How exactly do they do that?

Erin Fuse Brown: any sort of relatively sophisticated, entity or physician group will know about the corporate practice prohibition, just contract around it.

Dan: Contract around it. Build a kind of, I don't know, a paper firewall.

Erin Fuse Brown: The law says, you know, corporations shall not employ physicians. So they say fine, the corporation will not employ the physician. The corporation will, you know, the private equity company or the hospital, whoever will. run a management company and the management company will just contract with the physician practice, uh, to provide all the management services and we'll arrange a fee schedule, et cetera, et cetera.

Dan: Which is why, when a judge ruled against Envision in late May, allowing the lawsuit to go forward, it was kind of a big deal.

Because the judge's order that the case could proceed said: All that etcetera etcetera? All that contracting-around? That's a bunch of bullshit. Envision, you own this medical practice.

And if your practice does the things that Dr. Moreno's group alleges in their complaint? You're practicing medicine and breaking the law. And that complaint is alleging a lot of things.

Erin Fuse Brown: Oh, it's a lot of things, right? Like it's like telling them how to negotiate with managed care plans, billing on their behalf, weighing in, on hiring decisions of physicians and clinical staff like nurses and PAs.

Dan: And making doctor subject to those non-competes where, if they quit or got canned, they and their families would have to move.

Erin Fuse Brown: And it's like, that is the model for these private equity backed, physician practices. is Like

they roll up their sleeves and they get very heavily. involved In the management of that sort of day to day stuff,

Dan: And the court here seems to be saying: Yeah, if Dr. Moreno's group can prove that's happening, that would be the corporate practice of medicine. Not Okay.

Erin: And so it's kind of a shot across the bow.

A shot across the bow. OK, so now what? The docs who fired that shot are putting two million bucks into this case, and it's everything they have. What happens next?

That's right after this.

This episode of An Arm and a Leg is produced in partnership with Kaiser Health News. That's a nonprofit newsroom covering health care in America. KHN is not affiliated with the big health care outfit Kaiser Permanente. We'll have some more information about Kaiser Health News at the end of this episode.

So, a judge has ruled that the emergency-medicine doc group's lawsuit against Envision can go forward.

Emily: Yep, and by the way, we did reach out to Envision for this story. They said they don't comment on pending litigation.

Dan: So the case goes forward. What's next? Well, they have to actually win that lawsuit. And then, Dr. Lisa Moreno admits, that's just one lawsuit.

Dr. Lisa Moreno: So the only thing we are going to get out of this lawsuit is that Envision and Envision alone. Does not have the right to practice medicine in the state of California and the state of California alone.

Dan: And Envision is not the only private equity-backed group in this business. She names a couple of others.

Dr. Lisa Moreno: So team health can practice in California. Schumacher can practice in California. Cause the only thing the lawsuit says is, if we win. That Envision cannot practice in California and Envision can continue to practice in Tennessee and Envision can continue to practice in Florida, et cetera, et cetera.

Dan: But winning this lawsuit would ALLOW Dr. Moreno's group -- or others -- to bring similar lawsuits. Against other companies in California. Against companies in other states.

She hopes that's exactly what will happen.

Dr. Lisa Moreno: And what happens is when you gain that momentum and the federal government starts to see. That these lawsuits are popping up all over the place

then often federal legislators will say, you know what?

We need to propose a resolution. We need to propose a bill and bring that bill into law. That's going to say that in the United States, the corporate practice of medicine. Yes. Not going to be tolerated. It is illegal.

Dan: But that, she admits, is a long, long road. Not to mention an expensive one. Remember, they're committing at least 2 million dollars, everything they've got.

Dr. Lisa Moreno: And then you think about. \$2 million now to Sue Schumacher in California, , \$2 million to Sue Envision in Tennessee.

It just goes on and on.

Dan: She thinks it could take... decades.

And why is it up to Dr. Lisa Moreno to bring these lawsuits?

Gretchen Morgenson: where is the enforcement? Why hasn't there been enforcement? As these companies have taken over such a broad swath of the industry.

Dan: That is a journalistic hero of mine

Gretchen Morgenson: I'm Gretchen Morgansen. I'm the senior financial reporter for the investigations unit at NBC news.

Dan: Before NBC, she was at the New York Times and the Wall Street Journal. She's been covering the U.S. economy's biggest sharks for decades. Including but not limited to the financial industry before, during and after the 2008 financial crisis.

And she's been following private equity's role in medicine for a couple of years.

Emily: Yeah and her reporting alerted us to this lawsuit against Envision in the first place. Gretchen thinks that the lawsuit could be an example of how individual states may not have the capacity to police a company like this. And she says the judge touched on this issue when he allowed the case go forward.

Gretchen Morgenson: **One thing that I found very interesting was the discussion about why California as a state that does have a corporate practice of medicine law. Has not gone after these situations.**

Dan: Envision was arguing, Judge, don't bother with this. You can let state authorities handle this issue.

Gretchen Morgenson: **And, there was, quite a lengthy discussion by the judge which said, you know, perhaps the state can't go after, these entities, they don't have the bandwidth, they don't have the, you know, manpower basically.**

Dan: She tells me a story about a state that did try to enforce its corporate-practice-of-medicine ban. With super-underwhelming results.

In 2016 New York's attorney general sued a company called Aspen Dental for the corporate practice of medicine. And not just practicing.

Gretchen Morgenson: **the, company was directing dentists to, make decisions on care, that they were pushing products,**

Dan: Pushing products: Telling patients they needed things that they didn't.

In the end, they settled. Aspen didn't admit wrongdoing, but it did agree to pay a fine.

Gretchen Morgenson: **the settlement was like less than half a million dollars. I mean, it was not even probably what the company pays for postage.**

Emily: Dan, I can tell you that Aspen Dental paid just its owners 85 million in dividends, in 2018 alone. Ask me where I found that out.

Dan: where'd you find that out?

Emily: It's in a report from a watchdog group called the Private Equity Stakeholders Project. The report -- "how private equity drills into the dental care industry"

Dan: Ouch

Emily: ... is called: "Deceptive marketing, medicaid fraud, and root canals on babies."

Dan: Jesus. Root canals on babies?

Emily: Two different companies accused of that, actually.

Dan: OK, ANYWAY. That was the New York State attorney general.

Gretchen says even when the feds have gotten involved, companies like Envision don't exactly face overwhelming consequences.

She's written about a case where the feds accused an Envision subsidiary of taking kickbacks from a hospital.

The accusation was: ER docs were being told to admit patients to the hospital who did not need to be admitted. Because when a hospital admits a patient, they get a higher fee.

Gretchen Morgenson: three times the fees, right? Someone comes into the emergency department, if you, take them in and have them stay overnight, for observation you get three times the Medicare payments,

Dan: in this case, the U.S. Department of Justice brought a lawsuit.

... and settled. For \$29.8 million dollars.

Emily: Right. And for context, before Envision went private in 2014, it reported profits of more than 556 million dollars, 18 times as much.

Dan: Envision paid the fine, but didn't admit any wrongdoing. They did have to sign a "corporate integrity agreement" promising not to do bad stuff anymore.

Emily: Which expires at the end of this year.

and they didn't get barred from billing Medicare either.

Dan: I mean, how could Medicare do without the services of the 25 thousand ER docs Envision employs? It reminded me of banks being considered too big to fail-- or to punish too hard -- after 2008.

Gretchen Morgenson: that's very similar to what you had in the 2008 financial crisis. You've had many banks who, agreed to pay fines, which of course their shareholders paid it. Wasn't paid by the executives. Who'd made the decisions

Dan: I mean, my impression that someone who, you know, who wasn't on the beat was like these fines don't strike me as super meaningful, um, to institutions of this scale.

Gretchen Morgenson: No cost of doing business.

Dan: Yeah.

Emily: Are you and Gretchen trying to bum me out?

Dan: Gretchen does not see this as entirely hopeless.

Gretchen Morgenson: I mean, we have already seen the, chairwoman of the FTC come out and say that, They are going to be looking far more closely at private equity, acquisitions and takeovers of companies than they have been in the past. And particularly in healthcare, because it is life and death.

Emily: FTC chair Lina Kahn used exactly those words, life and death, when the FTC held a "listening forum" with the Department of Justice in April, about all kinds of mergers in health care, including private-equity companies buying up ER staffing. They heard some hair-raising stories. Here's part of how Lina Kahn summed up the day.

Lina Kahn: your testimony has also underscored is just the incredible variety of ways that firms with market power can use that. Right. And it becomes extremely difficult for enforcers to be able to police all of the subtle ways in which those firms are using their power and all sorts of anti-competitive ways, which I think makes it especially important for us to be stopping in anti competitive and illegal mergers on the front end.

Dan: It's not just talk. As we were writing the script for this episode, the FTC sued to stop a for-profit hospital company from taking over two of its biggest competitors in Utah.

And it's not just the feds. Gretchen sent me the text of a bill that's getting considered in the California legislature right now. It's also intended to put the breaks on mergers and private-equity buyouts in health care. Any transaction over 15 million bucks would need an OK from the state attorney general.

And look: Some changes do happen. As we've discussed on this show, one of the big strategies that private equity companies used to make money on emergency room docs was surprise billing. Taking all their docs out of all the insurance networks, and billing patients directly at sky high rates.

This year, we are seeing the implementation of the No Surprises Act, which effectively bans that practice.

EMILY: Though it took a really long time to pass. And obviously it leaves a lot of problems intact.

DAN: True. We are not running out of material for this show any time soon.

But it's also worth remembering that the No Surprises Act was passed by a divided Congress. Democrats controlled the House and Republicans controlled the Senate. In December 2020.

Which was a hyper-polarized MOMENT during this hyper-polarized era. We're talking about the weeks between the November election and the January 6th attack on the U.S. Capitol.

I'm not saying our elected officials are all going to hold hands and do the right thing immediately-- or maybe ever. But it does make it seem ... not entirely hopeless.

Emily: Here's how Dr. Lisa Moreno talks about the battle that she and her colleagues are waging with this lawsuit against Envision. How long the road is to ... whatever victory looks like.

Dr. Lisa Moreno: So I know that it may not happen even in my lifetime that it may not happen for decades, but to me. And to my colleagues on the board of directors of AAM, the fact that it's going to take a really long time is not an excuse to not take the first step. We have to take the first step because if we don't start it's, it will never happen.

Dan: Amen to that.

We will catch you with our next episode in three weeks.

Emily: Till then, take care of yourself.

Dan: This episode of An Arm and a Leg was produced by Emily Pisacreta and me, Dan Weissmann, and edited by Marian Wang.

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Diane Webber is national editor for broadcast at Kaiser health news, and Emmarie Hutteman is a correspondent there. They are editorial liaisons to this show.

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